Office-Supreme Court, U.S.
FILED
JUL 31 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1937, 80-1938, 80-1939, 80-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION, NORTH CAROLINA UTILITIES COMMISSION, AND NORTH CAROLINA NATURAL GAS CORPORATION, *et al.*

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*

Respondents,

TRANSCONTINENTAL GAS PIPELINE CORPORATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF THE RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

David E. Blabey
General Counsel
Rockefeller State Plaza
Albany, New York 12223

Richard A. Solomon*
Wilner & Scheiner
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 861-7830

Attorneys for the Public Service Commission of the State of New York

*Counsel of Record

DI CESARE - Printing — 331-4101 — Washington, D.C. 20006

QUESTIONS PRESENTED

In the opinion of the respondent, Public Service Commission of the State of New York, the issues presented by the petitions for certiorari from the opinion below are:

1. Whether the Commission could order a modification of the zone rate structure in effect of the Transco pipeline system for over 17 years without compliance with the provisions of Section 5(a) of the Natural Gas Act, where Transco had sought to increase its jurisdictional rates but had proposed no change in its zone rate structure.
2. Whether the Commission could avoid compliance with the requirements of Section 5(a) because the zone rate structure had originally been the product of a settlement.
3. Whether the Court of Appeals correctly set aside the Commission's opinion below when it determined that the Commission had failed to conform to the requirements of Section 5(a).
4. Whether the Court's affirmance of the Commission prescription of a 14% rate of return for Transco is inconsistent with its reversal of the Commission's prescription of a new zone rate structure.*

---

*The petition filed by the Federal Energy Regulatory Commission in No. 80-1937 correctly lists the parties to the case below.

TABLE OF CONTENTS

Page

Questions presented i

Table of Authorities iii

Opinion Below 1

Statement of the Case 2

Reasons for Denying Writ 6

Conclusion 19

TABLE OF AUTHORITIES

Cases: **Page**

Arkansas Louisiana Gas Co. v. Hall, 49 U.S.L.W. 4947 (July 2, 1981) 15

American Louisiana Pipeline Co. v. FPC, 344 F.2d 525 (D.C. Cir. 1965) 13

American Smelting and Refining Corp. v. FPC, 494 F.2d 925 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 882 (1970) 13

Ayrshire Colleries Corp. v. United States, 335 U.S. 573 (1949) 12

Colorado Interstate Gas Co. v. FPC, 325 U.S. 581 (1944) 5

Columbia Gas Transmission Corp. v. FPC, 628 F.2d 578 (D.C. Cir. 1979) 13

FPC v. Sunray DX Oil Co., 391 U.S. 9 (1968) 9

FPC v. Tennessee Gas Transmission Corp., 371 U.S. 145 (1962) 13, 14

Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974) 7, 18

Page

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 41 U.S. 246 (1951) 16

National Fuel Gas Supply Corp. v. FERC, Case No. 80-1586 (D.C. Cir.), *dismissed on other grounds*, December 30, 1980 11

Northern Natural Gas Co., 14 F.P.C. 11 (1955), *affirmed sub. nom.*, Interstate Power Co. v. FPC, 236 F.2d 372 (8th Cir., 1956), *cert. denied*, 352 U.S. 967 (1957) 13

State of Louisiana v. FPC, 503 F.2d 844 (5th Cir., 1974) 13

Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978) 12

United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) 8, 13

Administrative Cases:

Advances in Rates - Western Case, 20 I.C.C. 307 (1911) 12

Michigan Wisconsin Pipe Line Co., 34 F.P.C. 621 (1965) 13

Tennessee Gas Transmission Co., 27 F.P.C. 207 ... 14

Transcontinental Gas Pipeline Corp., 27 F.P.C. 187 (1962) 3

Statutes and regulation:

Federal Power Act, 16 U.S.C. 791, *et seq.* 17

Mann-Elkins Act of 1910, 36 Stat. 539, *et seq.* 12

Natural Gas Act, 15 U.S.C. 717 *et seq.*:

Section 4, 15 U.S.C. 717c 7,8,10,11,14,15,16,17

Section 4(a), 15 U.S.C. 717c(a) 14, 15

Section 4(b), 15 U.S.C. 717c(b) 14, 15

Section 4(c), 15 U.S.C. 717c(c) 15

Section 4(d), 15 U.S.C. 717c(d) 12, 15

Section 4(e), 15 U.S.C. 717c(e) ..9, 10, 13, 15, 17, 18

Section 5, 15 U.S.C. 717d(a) 7, 15, 16, 17

Section 5(a), 15 U.S.C. 717d(a) 5, 8, 9, 11, 12, 14

18 C.F.R. § 154.23 15

Nos. 80-1937, 80-1938, 80-1939, 80-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION, NORTH CAROLINA UTILITIES COMMISSION, AND NORTH CAROLINA NATURAL GAS CORPORATION, *et al.*
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*
Respondents,

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF THE RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

OPINION BELOW *

The Public Service Commission of the State of New York (New York), a respondent in Case Nos. 80-1937, 80-1938 and 80-1939 and an intervenor below in Case No. 80-2143, herewith files its brief in opposition to the

*New York adopts and incorporates by reference the jurisdictional statement of the Petitioner — 80-1939. (Pet. 2).

petitions and cross-petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review its decision of September 24, 1980 in *Public Service Commission of the State of New York, et al.* v. *FERC*, 642 F.2d 1335 (1980) (Pet. 1a-27a).[1]

STATEMENT OF THE CASE

These are petitions for certiorari from a decision of the Court of Appeals for the District of Columbia Circuit in *Public Service Commission of the State of New York, et al.* v. *FERC*, 642 F.2d 1335 (1980) (Pet. 1a-27a, 32a-33a). The Federal Energy Regulatory Commission (Commission), the North Carolina Utilities Commission and three North Carolina gas distributors have filed petitions, in Case Nos. 80-1937, 80-1938 and 80-1939 respectively, from that part of the Court of Appeals decision which reversed the Commission's Opinion No. 59 which had ordered the Transcontinental Gas Pipe Line Corporation (Transco) to place into effect a new zone rate structure assigning a substantially larger portion of the pipeline's costs to its rate zone 3. Transco has filed a cross-petition in Case No. 80-2143 requesting that any review of the lower court's opinion by the Court include the portion of the opinion below which affirmed the Commission's separate order prescribing a 14% rate of return on equity and ordering Transco to reduce its rates and make refunds to effectuate this determination.

Transco is a major interstate pipeline providing service, primarily from gas produced in Texas and Louisiana and the offshore federal domain adjacent to those states, to local distribution companies in states

[1] In this pleading, we use the notation "Pet.)" to refer to the Commission and Court opinions and orders set out as appendices to the Commission's petition in Case No. 80-1937, and "(Tr. Pet.)" to references to the Commission orders set out only in the Transco cross-petition in Case No. 80-2143.

extending from Alabama to New York. The pipeline has three rate zones: Zone 1, extending from the Louisiana-Mississippi border through Alabama and Georgia; Zone 2, covering the area between the Georgia-South Carolina border and the Virginia-Maryland border, and Zone 3 covering all areas north of Zone 2 to the system terminus in Southern New York.

The zone rate structure in existence on the Transco system was established by a 1962 order of the Federal Power Commission (predecessor to the FERC) in *Transcontinental Gas Pipeline Corp.*, 27 F.P.C. 187 (1962). This order approved a settlement among all parties to a pending proceeding providing for a rate differential at a 100% load factor of 2.8 cents per Mcf between Zones 1 and 2 and of 3.6 cents per Mcf between Zones 2 and 3 as being "in the public interest and appropriate to carry out the provisions of the Natural Gas Act" (27 F.P.C. at 189). On a number of occasions between 1962 and 1976, Transco made filings with the Commission to increase its rate level but proposed no changes in the existing zone rate structure. In eight separate orders, the Commission approved settlements which aproved higher rates but in each case left unchanged the existing zone rate structure.

The present Commission proceeding was instituted by a filing of July 30, 1976, in which Transco once again sought a general increase in its jurisdictional sales rates but proposed no change in the existing zone rate structure. The Transco filing was suspended and set for hearing by the Commission. Settlement negotiations then ensued at which, in addition to issues as to the proposed rate increase, both the Commission staff and the North Carolina parties raised questions as to the continuing validity of the zone rate structure. Eventually a settlement was reached on many of the issues which had been raised with respect to the Transco rate increase, but no agreement could be reached with

respect to the appropriate rate of return it should be allowed to earn on equity, an important cost factor in determining the validity of the rate level sought by Transco, or on the zone rate issue. Separate hearings, Initial Decisions and Commission orders on both of these issues ensued.

With respect to the appropriate rate of return on equity, the Presiding Law Judge in his Initial Decision (Tr. Pet. 4a-19a) determined that a 14% equity return would be just and reasonable in lieu of the 17% sought by Transco and the 13.5-13.75% proposed by New York. This determination was affirmed by the Commission (Tr. Pet. 1a-2a) and a petition for rehearing denied (Tr. Pet. 3a).

In a separate Initial Decision (Pet. 55a-62a), the Presiding Law Judge rejected the proposals for any change in Transco's existing zone rate structure, holding that the evidence of record did not support any increase in the rate differentials between Zone 3 and the other zones but, on the contrary, indicated that Zone 3 was already bearing more than its fair share of Transco's costs (Pet. 61a-62a).

The Commission in its Opinion No. 59 (pet. 36a-52a) reversed the Initial Decision and adopted a new zone rate structure based upon a "Mcf-Mile" study which, in weighting the relative cost responsibility of the various zones, gives consideration solely to the distance of haul. In reaching this conclusion, the Commission did not review the evidence of record, find the existing zone structure unjust, unreasonable, or unduly discriminatory, and substitute a new rate structure more consistent with the record facts. Instead, though it insisted that only cost factors were material to a proper zone rate structure (Pet. 39a, 49a), it started from the assumption that a Mcf-Mile study would best accomplish this cost allocation objective (Pet. 39a-40a), and placed upon Transco, and the Zone 3 parties

supporting the existing zone rate structure, the burden of demonstrating that other cost factors justified maintenance of the existing zone rate differentials (Pet. 40a). Then, ignoring the testimony introduced by the Zone 3 parties demonstrating that on a cost basis the existing zone structure was, if anything, overly favorable to Zones 1 and 2 (see Pet. 20a), it rejected the significance of the record evidence of the various factors which the Zone 3 contended showed that the existing rate zone structure did not discriminate against Zones 1 and 2. These factors included (a) the historical development of the Transco system to serve the loads in Zone 3,[2] (b) the higher load concentration in Zone 3, (c) the higher load factor of the Zone 3 customers and (d) the existence of major storage facilities in Zone 3 utilized by customers in Zones 1 and 2 to reduce their costs. While all of these factors had been held to be relevant to a proper zone rate structure in previous Commission determinations, the Commission held that Transco and the Zone 3 customers had not shown that they justified any deviation from the Mcf mile methodology which the Commission favored (Pet. 49a-50a).

The court below reversed the Commission zone rate determination but affirmed its rate of return determination (Pet 1a-27a). It concluded that, since Transco had not sought any change in the existing zone rate structure and the zone rate structure was not a cost factor underlying Transco's proposed rate increase, no change in the zone rate structure could be ordered by the Commission unless it complied with the requirements of Section 5(a) of the Natural Gas Act (Pet. 10a-17a). These requirements, the court held, had not been met because the Commission's decision "did not

[2]*See Colorado Interstate Gas Co.* v. *FPC*, 325 U.S. 581, 591-92 (1944) where this Court stressed the importance of this factor in affirming a Commission decision rejecting mileage-based rates.

determine that the old zone rates were unjust and unreasonable and because it did not provide a reasoned explanation for departure from settled practice" (Pet. 10a). The Commission, the court further concluded, had erred "in placing the burden of proof on the opponents of the change in cost allocation rather than upon itself" (Pet. 20a). The court also held that "in any event, the evidence of record" supporting the Commission's prescription of a new zone rate methodology "falls short of substantiality" (Pet. 21a).

With respect to the Commission's rate of return determination, the court rejectd Transco's contention that the rationale for the Commission decision was unclear or not based upon substantial evidence (Pet. 21a-24a). It also rejected the argument that the Commission had improperly failed to explain why it had fixed a rate of 14% rather than the 14.75% authorized by way of settlement in two prior Transco proceedings. Pointing out that, unlike the situation with the zone rate allocation, the Commission's rate of return determination was based upon essentially the same methodology it had previously followed and Transco had itself utilized in the present case, the court concluded that, in such circumstances, the Commission was not required to detail why it did not choose all other possible results which might have been justifiable in determining where, within a range of reasonableness, it would fix the pipeline's just and reasonable rate of return on equity (Pet. 24a-26a).

REASONS FOR DENYING WRIT

The principal issue in this case is whether the court of appeals properly held that the Commission had violated the Natural Gas Act, 15 U.S.C. 717 *et seq.*, in ordering a substantial revision of the zone rate structure under which the Transco system had been operating for seventeen years. The court below concluded that, since Transco in seeking to increase its rates had not sought to

change the existing zone rate differentials and the zone rate structure was not a cost factor underlying Transco's proposed rate increase, any action to change the zone differentials had to comply with the procedures of Section 5 of the Act governing rate changes not initiated by the pipeline, rather than the rate increase provisions of Section 4 under which the pipeline has the burden of proof. The court determined that the Commission had not complied with Section 5 since it had neither determined that the existing zone rate structure was unjust, unreasonable or unduly discriminatory, nor provided a "reasoned explanation for departing from settled practice" (Pet. 10a). It also concluded that "in any event, the evidence of record supporting that prescription [of new zone rate differentials] falls short of substantiality" (Pet. 21a).[3]

[3]The North Carolina distributors, alone among the petitioners, challenge this independent basis for the court's reversal of the Commission's opinion. At page 27 of their petition they suggest that rather than remanding the case to the Commisison to correct its legal error, the court below "proceeded to cull from the record" material favorable to the Zone 3 position while ignoring answering testimony and that this action constituted a "gross misapprehension of the substantial evidence test which warrants the intervention of the Court." This is, we suggest, a completely unfair description of the court of appeals discussion of the failure of the Commission to give any consideration to the Zone 3 testimony indicating that the existing zone rate structure was "a more accurate reflection of cost incurrence" (Pet. 20a), that the Commission had failed to explain the inclusion in its study of upstream gathering facilities whose costs do not vary to any extent because of their distance from Transco customers (*ibid.*), and that the Commission's stated reasons for ignoring the substantially greater load concentration in Zone 3 and the existence of storage facilities in Zone 3 utilized by customers in Zones 1 and 2 were not persuasive (Pet. 18a-19a, n.20). The record basis for Commission conclusions of this type is exactly the type of issue which this Court in *Mobil Oil Co.* v. *FPC*, 417 U.S. 283, 309-10 (1974) stated was a matter for review by the court of appeals rather than this Court, and nothing has been shown conceivably justifying an exception in this case.

The decision below is sound and involves no conflict with opinions of this Court or the other circuits. Nor is any genuine issue as to the administration of the Natural Gas Act presented which warrants plenary review by this Court.

1. The petitioners' primary legal challenge is to the lower court's determination that any Commission ordered change in zone rate structure on the Transco system must comply with the procedural standards of Section 5(a) of the Natural Gas Act. Petitioners contend that whenever a pipeline files a rate increase it not only has the burden under Section 4 of the Act of justifying that increase, but of all other aspects of its existing rate structure, including zone rate differentials, even though they are neither directly nor indirectly determinative of the rate increase it seeks and no change therein is sought. Accordingly, it is argued, the Commission was free in this case to impose a different zone rate structure it presumed to be more in the public interest, unless the pipeline could affirmatively demonstrate the superiority of the existing structure. The basic difficulty in the argument is its failure to distinguish between a pipeline sponsored rate increase and elements of the pipeline's rate structure which do not affect the revenues to be received by the pipeline but determine, instead, how such revenues are to be allocated between its various categories of customers.

This Court has made clear in *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956), that under the Natural Gas Act "the basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be unjust, unreasonable, unduly discriminatory or preferential:"

> . . . Section 5(a) would of its own force aply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the

> latter case the power is implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power in the case of a newly changed rate or contract . . . , the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive by means of the refund procedure, to the date the change became effective.

In addition, where "a rate or change" is sought to be increased, Section 4(e) places the burden of proof of showing that the increase is just and reasonable upon the pipeline.[4]

The court below concluded that the existing Transco zone rate structure, was not a factor in, or determined by, the rate increase sought by Transco, and thus could be modified by the Commisison only pursuant to the provision of Section 5(a). The petitions largely ignore the distinction drawn by the court[5] and focus instead

[4]Even with respect to the pipeline's rate level, the existing rates can only be reduced prospectively pursuant to a determination in Section 5 of the Act. As this Court held in *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 23-24 (1968), any rate which has been finally established in a valid Commission order, constitutes the "lower limit below which a refund cannot be ordered under § 4(e)." The Commission, of course, is not forever precluded from reducing a pipeline's rate level below that of the "last clean rate" level, but to do so it must proceed under Section 5(a) of the Act, under which it rather than the pipeline, has the burden and its action is prospective only.

[5]The petitioners make a half-hearted effort to suggest that, since the rates to the different zones rise by the amount of the existing differentials as a result of any Transco rate increase, the zone rate structure is itself an integral part of the rate increase. But the differential in rates between the zones remained undisturbed during the period Transco's rate increase was suspended and would not be affected by a total acceptance or rejection of the rate increase.

upon a question not involved in the case. This is whether, when a pipeline makes a rate increase filing under Section 4 of the Act which purports to justify the higher rate upon asserted increases in the cost of some of the underlying components, the Commission is required to proceed under Section 5 if it wishes to offset the increased costs by reductions in other cost factors. Such an issue would arise if, for example, a pipeline posited a rate increase on a claimed need for a higher rate of return, but proposed no change in depreciation rate, and the Commission concluded on the basis of record evidence that the depreciation rate should be reduced to a degree which would match the approved increase in return.

The Commission petition argues at length that all factors material to a determination of a pipeline's just and reasonable rate level are put in issue when a pipeline seeks a rate increase regardless of whether it justifies the increase solely on the basis of changes in particular components. But the court below did not hold to the contrary and could not have done so since the issue was not before it. Any doubt as to this question is dispelled by the modification of the court's opinion made on rehearing in response to the Commission's Petition. Specifically, it deleted a paragraph (Pet. 15a-16a) which the Commission had contended would unduly limit its authority over rate increases, and substituted language (Pet. 32a-33a) which makes clear that its holding is based upon the fact that the zone rate structure was not part of Transco's rate increase:

> Transco's filing of a rate change continued to incorporate the existing zone rate differential. Had Transco proposed any changes in them, the Commission, acting under Section 4(e), could have approved the changes in whole or part. Section 4(e), however, cannot be used by the Commission to institute any change in a

> rate making component, such as cost allocation, *that does not represent at least partial approval of the change for which the enterprise* had petitioned in the filing. If the Commission seeks to make such changes, it has no alternative save compliance with the strictures of Section 5(a). (emphasis added.) [6]

The Commission's petition suggests that certiorari is warranted because a number of parties in pending Commission proceedings have contended that the court of appeals opinion should be given a reading beyond what it purported to decide. The simple answer is that this Court does not give advisory opinions on matters not involved in cases decided by the lower courts. Thus, even if the opinion below was susceptible

---

[6]Significantly, the Commission itself has denied that the opinion below holds that cost factors underlying a pipeline's proposed rate increase which it does not seek to change, can only be considered under Section 5(a). In *National Fuel Gas Supply Corp.* v. *FERC*, Case No. 80-1586 (D.C. Cir.), *dismissed on other grounds*, December 30, 1980, the pipeline had contended that the decision in the present case precluded the Commission from initiating a hearing under Section 4 of the Act to challenge a proposed rate increase on grounds that an element of the pipeline's claimed costs, which it did not propose to change, was improper. In opposing a motion for summary reversal, the Commission stated that the petitioner's reliance upon the opinion here was "misplaced" since "under the court's interpretation of the Commission's Section 4 authority in *Public Service Commission*, National Fuel would have the burden of proof to justify an increase in rates filed by the pipeline." (FERC Response in Opposition to Motion for Summary Reversal, p. 7). The Commission also noted that "here the Commission has chosen to examine a subject—the cost of purchased gas in storage—which is solely responsible for part of the company's rate increase request. In *Public Service Commissin*, the Commission chose to examine not something which directly triggered a price increase, but an underlying (albeit integrally realted) formula." (FERC Response in Opposition to Motion for Summary Reversal, p. 9).

to a broader reading than we believe is justified, it would be premature for the Court to attempt to resolve the issue.

2. When we turn to what the court below actually decided, the asserted basis for certiorari dissolves. Neither the language of the Natural Gas Act nor its legislative history[7] suggest that a "rate, change, classification or service" reflected in a pipeline's existing tariff, which is not itself sought to be changed by a pipeline filing under Section 4(d), and is neither determinative of or determined by a proposed rate increase filing, is subject to retroactive change under the provision of Section 4(e) of the Act. Nor is there anything in the Act which suggests that a pipeline has the burden of proving that unchanged elements of its tariff which do not affect a proposed rate increase are superior to any alternatives thereto which the Commission may believe are more in the public

---

[7]The cases arising under the Interstate Commerce Act cited by the Commission do not support its position. *Ayrshire Colleries Corp.* v. *United States*, 335 U.S. 573 (1949), is fully consistent with the decision below: the ICC's action there to modify a rate which had not been sought to be changed by the carrier, was undertaken as a result of an investigatory proceeding initiated by the Commission under provisions of the Interstate Commerce Act analogous to Section 5(a) of the Natural Gas Act (see 335 U.S. at 581-83) and the Court held that the Commission had met its burden of justifying rate changes initiated by it (355 U.S. at 586). *Advances in Rates - Western Case*, 20 I.C.C. 307 (1911) is similarly inapposite. The Commission held that in its consideration of the railroads' initial rate filings after the passage of the Mann-Elkins Act of 1910, 36 Stat. 539, *et seq.*, the carriers had the burden of justifying the entire rate and no "grandfather" rights existed with respect to existing rates which had not previously been subject to regulation by the Commission. (*Cf., Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978)). There was no suggestion that the carriers' filings, in addition to putting into issue the entire rate sought to be increased, imposed a burden on the carrier with respect to practices or classifications not sought to be changed.

interest. On the contrary, the dichotomy between changed and unchanged parts of a pipeline's tariff, as this Court pointed out in *United Gas Pipeline Co.* v. *Mobile Gas Service Corp., supra,* is an integral element of the legislative scheme. Moreover, even in the case of pipeline initiated changes subject to the provision of Section 4(e), the burden of proof falls upon the pipeline only where the proposed change involves a rate increase. *See American Louisiana Pipeline Co.* v. *FPC,* 344 F.2d 525 (D.C. Cir. 1965).

Contrary to the Commission petition (pp. 13-14) there is no consistent Commission construction of the Act as authorizing it to order changes in existing cost allocations, rate zone differentials or rate designs, not sought by the pipeline, pursuant to the provisions of Section 4(e) of the Act. While the Commission, as a matter of administrative convenience, has frequently considered pipeline proposed rate increases and cost allocation or rate design questions raised by parties other than the pipeline in the same proceeding or opinion, in most of the cases cited in the Commission petition no claim was made that the pipeline had the burden of proof with respect to anything but its proposed rate increase. In those cases where the issue has been decided either by the Commission or the courts it has uniformly been held that the party seeking the change in the particular tariff element has the burden of proof. *See Northern Natural Gas Co.,* 14 F.P.C. 11 (1955) *affirmed sub nom., Interstate Power Co.* v. *FPC,* 236 F.2d 372 (8th Cir., 1956) *cert. denied,* 352 U.S. 967 (1957); *Michigan Wisconsin Pipe Line Co.,* 34 F.P.C. 621 (1965); *Columbia Gas Transmission Corp.* v. *FPC,* 628 F.2d 578 (D.C. Cir., 1979); *American Smelting and Refining Corp.* v. *FPC,* 494 F.2d 925, 941 (D.C. Cir., 1974) *cert. denied,* 419 U.S. 882 (1970); *State of Louisiana* v. *FPC,* 503 F.2d 844, 861 (5th Cir., 1974).

FPC v. *Tennessee Gas Transmission Co.,* 371 U.S. 145

(1962), relied upon by the petitioners, is not inconsistent with the opinion below. In contrast to the present case where Transco proposed no change in its rate zone structure, Tennessee in a July 1, 1957 rate filing had proposed a significant change in its existing zone rate structure. *See Tennessee Gas Transmission Co.*, 27 F.P.C. 202, 206, 230-231 (1962). This change in zone rate structure was suspended and set for hearing under Section 4 of the Act, and was in effect subject to refund, after the end of the statutory suspension period, when Tennessee on October 5, 1959, made the new filing seeking the increase in rates which resulted in the interim order reducing the rate of return sought by the pipeline approved by this Court in *FPC* v. *Tennessee Gas Transmission Co., supra.* The references in this Court's opinion to the possibility of additional refunds as a result of the continuing proceeding on the propriety of the pipeline's existing zone rates, thus are not even dicta for the proposition that the Commission could modify rate zone structures which the pipeline has not sought to change other than under Section 5 of the Act.

3. The petitioners also contend that the Commission was not required to comply with the requirements of Section 5(a) of the Act in ordering a change in Transco's existing zone rate structure, since it had initially been approved by the Commission as part of a settlement. The argument incorrectly assumes that the lawful "rates, charges, practices and classifications," which can only be changed on the Commission's initiative pursuant to the procedures mandated by Section 5(a) of the Natural Gas Act, are those which have been expressly approved by the Commission in a litigated proceeding as meeting the substantive standards of Sections 4(a) and (b).

There are four paths by which rates, charges, classifications or services may become the lawful ones which the pipeline is obligated to follow until it seeks to

change them pursuant to Section 4 filing or the Commission directs a change pursuant to Section 5. They may be "initial filings" under Section 4(c), not subject to the provisions of Sections 4(d) and (e) relating to pipeline initiated changes. They may be pipeline proposed changes which the Commission allows to go into effect without any determination as to whether they meet the standards of Sections 4(a) and (b). They may, as here, be the product of a settlement of a proceeding, originally set for hearing pursuant to Section 4(e), which the Commission approved as being "in the public interest and appropriate to carry out the provisions of the Natural Gas Act." Or, they may be the product of a Commission decision in a litigated proceeding in which it either finds that a change proposed by the pipeline was just and reasonable and not unduly discriminating or preferential, or prescribes a rate, charge, practice or classification meeting these standards after determining that the existing or proposed one does not. In all four of these situations the resulting rate, charge, practice or classification becomes the lawful "filed rate" which, unless a change is proposed by the pipeline, can only be modified pursuant to the provisions of Section 5 of the Act. *See Arkansas Louisiana Gas Co.* v. *Hall,* 49 U.S.L.W. 4947 (July 2, 1981).

When the Commission allows a pipeline proposed change in an element of its tariff to become effective without suspension, it does not approve the change or certify that it is consistent with the standards of Section 4(a) or (b) of the Act. On the contrary, Section 154.23 of the Commission's Regulations under the Natural Gas Act, 18 C.F.R. 154.23, expressly states that "the acceptance for filing of any tariff, contract or part thereof is not to be considered as approved by the Commission." Yet, even where fraud may have led to the Commission's acceptance of the proposed change

without suspension, the new rate charge, practices or classification can only be modified, where the pipeline does not take the initiative to do so, pursuant to the provisions of Section 5 of the Act. *See Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951). It has not been suggested that if the existing Transco zone rate structure had resulted from a pipeline proposal which the Commission had allowed to become effective in 1962, and the Commission, on its own motion or at the request of one of the North Carolina distributors subsequently initiated a proceeding to determine whether the zone rate structure was unduly discriminatory, it could proceed under Section 4 rather than Section 5. Certainly the lawful zone rate structure was no more vulnerable to preemptory change unless the pipeline could prove its validity where, as here, it had been approved by the Commission in a series of orders extending over a 14 year period. In short, the fact that the zone rate structure was the product of a settlement which could not be cited as a precedent or *res judicata* in subsequent proceedings any more than if the rate structure had been merely accepted for filing, does not shift the burden of proof in such proceedings from those proposing to change the existing lawful zone rate structure.

The argument that the court of appeals opinion threatens to vitiate the settlement procedure which has proven to be a valuable tool for the Commission in carrying out its rate responsibilities under the Natural Gas and Federal Power Acts is, we respectfully suggest, pure hyperbole. The reasons why pipelines or utilities, their customers and other intervening parties are willing to settle some or all of the issues presented in rate proceedings are numerous and varied, and there has been no showing that knowledge that a settled rate, charge, practice or classification has the same legal

status as a litigated one insofar as the application of Sections 4 and 5 to future proposed changes are concerned, will have any impact upon the various parties' willingness to settle.

As detailed in the Opposition to Certiorari being filed by the Zone 3 Customer Group, the opinion below has not, contrary to the suggeston of the petitioners, resulted in any reduction in the number of settlements presented to the Commission for full or partial resolution of rate proceedings filed under either the Natural Gas or Federal Power Acts. Moreover, since all issues relating to the propriety of a rate increase sought by a pipeline or public utility, or underlying its cost presentation in support of the higher rate, remain in issue in the Section 4(e) proceeding on its proposed rate increase, the impact of the decision below upon settlement of the rate proceedings initiated by pipelines or utilities should not be significant. On the contrary, the knowledge that a rate increase filing does not put in jeopardy all other facets of a tariff may well enhance prospects for settlement.[8]

4. Transco's efforts in its cross-petition to bring its complaints with the Commission's rate-of-return determination within the umbrella of the court of appeals' holding with respect to the zone rate structure are unpersuasive. The primary difference between the

[8]The North Carolina petitioners, but not the Commission, seek to raise an additional issue stemming from the fact that the court below not only reversed the Commission opinion, but set it aside, rather than remanding the case for further Commission proceedings. The argument fails to recognize that the court held the Commission had failed to proceed under Section 5 of the Natural Gas Act, which permits only prospective changes in a pipeline's tariff, and that there was no substantial record support for the Commission prescription of a new zone rate structure. Under those circumstances the court's order setting aside Commission Opinion No. 59 was proper and certainly raises no issue warranting plenary consideration by this Court.

two situations is, of course, that Transco initiated a rate increase proceeding under Section 4(e) of the Act, based in large part upon its claim for a higher rate of return. It thus clearly assumed the burden of proof on the rate increase and all cost elements material thereto, as well as subjecting itself to refunds of any part of the increase found to be unwarranted. Moreover, as the court below noted (Pet. 26a), the Commission, in fixing a return on equity of 14%, in lieu of the 14.75% rate adopted by way of settlement in the two prior proceedings, was not, as in the case of its imposition of a new zone rate structure, applying a new methodology arguably requiring a more detailed justification. It was, instead, making a judgmental determination, based on substantial record evidence and a sufficiently reasoned discussion of the basis for its conclusion, as to where, within the range of reasonableness, the pipeline's allowance for return on equity should be fixed. In short, the court of appeals conclusion on the rate of return issue was exactly the type of review of agency action which this Court has made clear is not a basis for certiorari. *See Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 306-310 (1974).

CONCLUSION

No basis has been shown in the several petitions for a writ of certiorari warranting plenary review of the court of appeals' opinion in this case. The petitions should, accordingly, be denied.

Respectfully submitted,

David E. Blabey
General Counsel
3 Rockefeller State Plaza
Albany, New York 12223

Richard A. Solomon
Wilner & Scheiner
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 861-7830

Attorneys for the Public
Service Commission of the
State of New York

July, 1981